

mechanisms are the only appropriate remedy for a country's non-compliance with the Agreement. The "public interest" test is no less contrary to the MFN and Market Access principles than the ECO policy.

DT also is concerned that the FCC may intend to preserve its discretion to review the effectiveness of foreign regulation in the destination market as one part of the "public interest" entry test. The FCC stated that it generally would not consider that factor in determining whether to regulate a foreign-affiliated U.S. carrier as dominant (Notice at ¶ 87),¹⁷ but the FCC did not formally discard that factor for purposes of deciding whether to permit a foreign carrier to enter the U.S. market. Indeed, the FCC's willingness to take into account many aspects of the ECO policy -- whether the foreign carrier has market power in its home country, whether there are legal barriers to entry in that country, whether multiple facilities-based international licenses have been granted, and whether a foreign carrier has close ties with foreign government entities (Notice at ¶¶ 40-43) -- suggests that the "public interest" standard may simply be the ECO policy in disguise.

The FCC should clarify that it will not delay foreign carrier entry into the U.S. market pending an inquiry into the effectiveness of the regulatory regime at the foreign end. Certainly, the FCC would not approve were foreign countries to delay U.S. carrier entry into their markets pending an inquiry into the effectiveness of the federal and state

¹⁶(...continued)

all other countries who agreed to be bound by the WTO Basic Telecom Agreement did so with the understanding that certain countries who made lesser commitments would be treated the same as all other signatories.

¹⁷ Even here the FCC's use of the word "generally" suggests that it desires to preserve the discretion to conduct such an inquiry on an ad hoc basis in particular cases. That is symptomatic of the FCC's overall propensity in the Notice to seek to preserve the right to deny entry or impose restrictions contrary to the WTO Basic Telecom Agreement on a case-by-case basis.

regulatory regimes in the United States. Further, DT is certain that the German market will be fully open and in compliance with all GATS requirements as of January 1, 1998. In these circumstances, the questionable benefits of gauging the effectiveness of a foreign regulatory regime are more than offset by the risk that the inquiry will be used as an excuse to delay foreign carrier entry. Therefore, the FCC should clarify that it will not undertake any such inquiry for any foreign carrier.

Lastly, once the FCC clarifies that it will not inquire into the effectiveness of foreign regulation, DT submits that the FCC also should concede the irrelevance of foreign market power to the "public interest" test. The existence of foreign market power does not itself threaten competitive conditions in the U.S. market. By adopting an effective regulatory regime to prevent abuse of such market power, the foreign regulator would prevent that market power from distorting competitive conditions in its own country and, by extension, in the United States and other countries as well. From a public policy standpoint, there is no reason to be concerned about foreign market power unless there is some reason to believe that the foreign country will not adopt or implement an adequate regulatory regime. Therefore, once the FCC abjures the inquiry into the effectiveness of foreign regulatory regimes, there is no legal or empirical basis for the FCC to take foreign market power into account in determining whether to permit a foreign carrier to enter the U.S. market or what regulations to impose upon it.

II. THE FCC SHOULD NOT IMPOSE ANY DOMINANT CARRIER REGULATIONS UPON FOREIGN CARRIERS BASED UPON FOREIGN MARKET POWER OR FACILITIES-BASED LICENSING DECISIONS BY FOREIGN COUNTRIES

The Notice proposes to impose so-called basic safeguards upon foreign carriers who have market power at the foreign end of the route, and to impose so-called supplemental safeguards as well upon foreign carriers who "do not face international facilities-based competition on the foreign end of a U.S. international route." Notice at ¶ 81. In determining whether a foreign carrier has market power, and whether it faces competition from facilities-based international carriers, the FCC stated that it "generally [will] not consider the effectiveness of foreign regulation in the destination market as a relevant factor." Id. at ¶ 87.

A. WTO Implementation By Other Countries.

Most European Union member countries and numerous other major trading partners of the United States will implement the WTO Basic Telecom Agreement, as they agreed, without imposing either basic or supplemental safeguards upon U.S. or other foreign carriers who seek to enter their markets. These countries will not examine whether new entrants have market power in other countries, or whether they are subject to facilities-based international competition in other countries.

B. Lack of Need for Safeguards.

There is no need for the safeguards the FCC proposes. Despite the FCC's experiences over many years with foreign-affiliated U.S. carriers, the FCC does not cite even one instance of leveraging behavior by a foreign carrier. Further, the emergence of

global market forces on many routes in recent years, and the acceleration of competition under the WTO Basic Telecom Agreement, will eliminate any theoretical incentive or ability for foreign carriers to engage in such behavior. Moreover, each of the market power abuses hypothesized by the FCC (see Notice at ¶ 90) involves conduct which violates the FCC's existing International Settlements Policy or presumes an ineffective foreign regulatory regime or both. Without any reason to believe that safeguards directed at foreign carriers are necessary to address a real market problem, the FCC should rely upon post-entry rules of general applicability to address potential anticompetitive behavior by foreign- or U.S.-owned carriers. The principal result of adopting the safeguards would be to impede competitive entry opportunities for foreign carriers, thereby diminishing competition in the U.S. international telecommunications market and denying U.S. consumers the benefits of service innovation and competitive pricing.

C. GATS Principles.

The Notice proposes to establish three classes of foreign carriers from WTO member countries: (i) foreign carriers without market power, who will not be subject to dominant carrier safeguards; (ii) foreign carriers with market power in a country where there is facilities-based international competition, who will be subject to basic safeguards; and (iii) foreign carriers with market power in a country lacking facilities-based international competition, who will be subject to basic and supplemental safeguards. This tripartite regulatory classification of foreign carriers conflicts squarely with fundamental GATS principles.

(i) Most Favoured Nation.

GATS Article II requires the FCC to accord nondiscriminatory treatment to carriers from different countries "immediately and unconditionally." The proposed classification system openly discriminates among foreign carriers, and imposes conditions upon equality of treatment, in violation of the MFN principle. The FCC cannot legitimately defend its proposed classification system on the ground that the FCC is acting to prevent anti-competitive conduct as required by the WTO Reference Paper. As noted above,¹⁸ the WTO Reference Paper is an Additional Commitment which cannot modify the MFN commitment of the United States Government under GATS Article II. Further, the WTO Reference Paper does not permit any country to adopt measures designed to control foreign market power; the WTO regime requires the foreign country to adopt the appropriate measures to address the potential abuse of foreign market power.¹⁹

Nor can the FCC legitimately defend the proposed classification system based on the likeness criterion in the MFN standard. The distinction between regulating a foreign carrier as nondominant and imposing basic safeguards -- namely, whether the foreign carrier possesses market power at the foreign end of the route -- is not an appropriate criterion for determining whether one carrier is "like" another carrier.²⁰ Further, given the FCC's decision not to consider the effectiveness of foreign regulatory regimes in WTO member countries, foreign market power is an irrelevant criterion. The mere existence of foreign

¹⁸ See page 13 *supra*.

¹⁹ See pages 14-15 *supra*.

²⁰ See page 9 *supra*.

market power does not implicate U.S. policies if, as the FCC must assume, the WTO member country at the foreign end of the route has an adequate regulatory regime in place.

Further, the distinction between a foreign carrier who is subject to basic regulation only and a carrier who is subject to both basic and supplemental safeguards -- whether the carrier is subject to facilities-based international competition in its own country -- is equally untenable. European Union member countries and other major trading partners of the United States have committed to granting multiple facilities-based licenses upon request. As of June, 1997, Germany has granted five nationwide and 22 regional facilities-based Class 3 licenses, as well as eight nationwide and four regional Class 4 voice telephony service licenses. Therefore, as among those WTO member countries, the FCC's supplemental safeguards would apply solely to carriers from countries who fail to comply with their WTO commitments. While DT certainly does not condone non-compliance by any country, the only appropriate mechanism for enforcing the agreement is through established WTO consultation and dispute resolution mechanisms. The United States Government should not engage in self-enforcement either by excluding a foreign carrier from the U.S. market or by imposing special regulations upon it. As a general matter, the FCC cannot impose supplemental safeguards upon foreign carriers from WTO member countries because it is contrary to the GATS framework for the FCC to accord U.S. regulatory consequences to the licensing decisions and competitive situation in those countries.

(ii) National Treatment

The Notice does not discuss whether, or under what conditions, the FCC would impose the same basic or supplemental safeguards upon U.S.-owned carriers.

Assuming that the FCC does not plan to impose such safeguards upon U.S.-owned carriers,²¹ the National Treatment principle prevents the FCC from imposing those safeguards upon foreign carriers who participate in the U.S. telecommunications market. Further, DT submits that both sets of safeguards, and particularly the supplemental safeguards, would impose a competitive handicap upon foreign carrier entry into the U.S. market.²² As such, those safeguards are precisely the kind of discrimination that the National Treatment principle in GATS Article XVII was designed to prohibit.

(iii) Domestic Regulation

The FCC's tripartite classification system does not comply with the requirement of GATS Article VI for "reasonable, objective and impartial" domestic regulations. In particular, the FCC does not provide any concrete guidance to foreign carriers regarding the factors the FCC will consider in evaluating foreign market power. The FCC proposes to "dispens[e] with detailed review of competitive conditions in foreign

²¹ As noted above, in order to comply with the National Treatment principle, the FCC would have to impose such requirements both upon U.S. carriers who have an ownership interest in a foreign carrier with market power, and upon dominant U.S. carriers who have an ownership interest in a foreign carrier without market power. DT submits that the sensible approach, and the one that accords most closely with the pro-competitive objectives of the WTO Basic Telecom Agreement, is to avoid imposing basic or supplemental safeguards upon any carriers.

²² The FCC is far beyond the point of doubting the competitive impact of record-keeping, reporting and other administrative burdens, to say nothing of the substantive prohibitions in the proposed supplemental safeguards. E.g., Streamlining the International Section 214 Authorization Process and Tariff Requirements, 11 FCC Rcd 12884 (1996) (reducing tariff notice and content requirements, and permitting global Section 214 authorizations, to eliminate unnecessary regulatory delays and promote competition); Market Entry and Regulation of Foreign-Affiliated Entities, 11 FCC Rcd 3873 (1995) (adopting shorter notice period for foreign-affiliated carriers to enhance such carriers' flexibility to respond to consumer demand).

markets" (Notice at ¶ 5), thereby indicating that the FCC plans to modify its current approach to analyzing foreign market power. Yet the FCC declines to specify the factors it will analyze, or address whether those factors permit an accurate assessment of foreign market power. If the FCC decides over DT's objections to analyze foreign market power as an element of its regulatory classification system, DT requests that the FCC specify objective criteria that will permit foreign carriers to know with certainty whether they will be subject to dominant carrier regulation and when that status will change.

The FCC also fails to state whether it will retain or modify the current 25% ownership standard for defining foreign affiliation. Moreover, the FCC has not applied the current standard uniformly among foreign carriers, as evidenced by its treatment of DT's and France Telecom's ownership interest in Sprint. The FCC should specify a single level of foreign carrier ownership in a U.S carrier that would trigger the imposition of safeguards and then apply that standard uniformly.

Further, DT is concerned that there may be room for the FCC to insert subjective criteria implicitly into the threshold inquiry for applying supplemental safeguards. Without conceding its objection to that inquiry on MFN grounds, DT submits that the FCC should not impose supplemental safeguards upon any carrier from a WTO member country who has granted multiple facilities-based licenses. In determining whether a foreign carrier faces "competition from multiple facilities-based international carriers" (Notice at ¶ 84), the FCC should clarify that it will not attempt to assess the quality or extent of the "competition" that such licensees are exerting in the foreign country or the effectiveness of the regulatory regime that the foreign Government has implemented.

D. Special Concessions.

Apart from its opposition to the FCC's proposed basic and supplemental safeguards on GATS grounds, DT has more specific objections to the FCC's proposed safeguards involving special concessions. The FCC proposes to modify the current policy to prohibit only those concessions granted by foreign carriers with market power. Notice at ¶ 115. In the alternative, the FCC seeks comment on whether it should permit exclusive arrangements on routes where the foreign carrier has market power if the foreign country has "eliminated barriers to international facilities-based entry and licensed multiple international facilities-based competitors." Id. at ¶ 118. However, the FCC's proposals would permit exclusive arrangements between dominant U.S. carriers and foreign carriers who lack market power.

DT submits that the FCC's current and proposed policies governing special concessions are relics of a bygone era of telecommunications regulation. For WTO member countries, there is no reason to fear that foreign carriers with market power will be able to undermine competition in the United States through concessions or exclusive arrangements. With multiple facilities-based international carriers and an effective regulatory regime in the foreign country, such arrangements will not foreclose other U.S. carriers from any significant portion of the international telecommunications market. The principal result of adopting such a policy would be to stifle the development of innovative service and pricing arrangements to the detriment of U.S. consumers. At a minimum, if the FCC believes the "special concessions" policy remains necessary to prevent unchecked foreign market power,

the FCC should apply that policy only as a supplemental safeguard on routes where the foreign Government has refused to issue multiple facilities-based international licenses.²³

III. THE FCC SHOULD NOT IMPOSE DOMINANT CARRIER SAFEGUARDS UPON CARRIERS FROM WTO COUNTRIES WHO HAVE AN ACCOUNTING RATE THAT COMPLIES WITH THE PROPOSED BENCHMARK RANGE

The FCC's proposed policies are not necessary to address the FCC's concerns about anti-competitive practices by foreign carriers. Initially, the FCC acknowledges that the WTO Basic Telecom Agreement itself will prevent foreign carriers from leveraging foreign market power into the U.S. market. The Notice correctly stated (at ¶ 31):

"[M]ost foreign carriers with monopoly positions today should have far less market power as a result of the WTO commitments, not only because they would be newly subject to competition but because they would be subject to meaningful disciplines to prevent abuse of market power in the form of interconnection obligations and other competitive safeguards to which their governments have committed. . . . The market access and regulatory commitments that their governments have made should provide a meaningful check on their exercise of market power."

The FCC's conclusion that it should rely upon "competitive forces . . . as a means of achieving the maximum benefits for U.S. consumers" (Notice at ¶ 33) shows that there is no need for any dominant carrier safeguards upon foreign-affiliated carriers.

In addition to the WTO Basic Telecom Agreement, the FCC relies upon its proposed settlement rate benchmark policies in IB Docket No. 96-261 to prevent foreign carriers from undermining competitive conditions in the U.S. telecommunications market. The FCC asserts that "the rules we have proposed in the Benchmarks proceeding would

²³ Also, under the National Treatment principle, the FCC must define the policy to include exclusive arrangements between dominant U.S. carriers and foreign carriers on any route.

largely eliminate the ability and incentive of foreign carriers to engage in anticompetitive conduct." Notice at ¶ 38. Despite DT's serious reservations about the unilateral nature of the FCC's benchmark proposals,²⁴ DT agrees with the FCC's objective of reducing global settlement rates to cost-oriented levels and DT's settlement rates on the U.S. route are among the lowest of any foreign carrier.

After having concluded that the WTO Basic Telecom Agreement and its proposed benchmark policies will successfully address any foreign market power concerns, the FCC nevertheless proposes two more layers of regulations in the form of basic and supplemental dominant carrier safeguards. These safeguards are entirely unnecessary, and will significantly burden foreign carriers who seek to participate in the U.S. market. The FCC's tentative conclusion that these safeguards will not unduly impede competitive entry (e.g., Notice at ¶ 109) is contrary to the FCC's own experience with such regulations in developing competitive markets in the United States. The FCC has concluded time and time again that the costs of unnecessary or redundant regulations can be a potent competitive handicap for regulated carriers, thereby limiting service and price competition to the detriment of U.S. consumers.²⁵

Without compromising its position that the FCC should not adopt the proposed foreign carrier safeguards on any route, DT submits that the FCC at least should dispense with dominant carrier safeguards (both basic and supplemental) for WTO member countries

²⁴ See Comments of Deutsche Telekom AG, IB Docket No. 96-261, filed Feb. 7, 1997.

²⁵ See cases cited in footnote 22 supra.

where the settlement rate on the route is within the FCC's proposed benchmark range.²⁶

For routes characterized at the foreign end by multiple facilities-based international carriers, a pro-competitive regulatory regime, and cost-oriented settlement rates, there is not even a remote possibility that the foreign carrier could engage in anti-competitive activities in the U.S. market through affiliated carriers. In DT's view, the U.S.-Germany route easily qualifies for the removal of dominant carrier safeguards under this common-sense standard. The German Government has granted multiple facilities-based licenses; the German Parliament adopted comprehensive telecommunications legislation in 1996 that fully conforms to all applicable GATS principles; and the settlement rate on the U.S.-Germany route approaches the low end of the FCC's benchmark range at .08 SDR/minute. DT has expressed its willingness to accept a further reduction of the settlement rate to .075 SDR/minute (i.e., \$.10/minute).

IV. THE FCC SHOULD ADOPT AN UNQUALIFIED OPEN ENTRY POLICY FOR INDIRECT FOREIGN OWNERSHIP OF TITLE III LICENSES

In its Schedule of Specific Commitments, the United States preserved the restrictions on direct foreign ownership of Title III licenses under Section 310 of the Communications Act of 1934, but committed to impose no restrictions of any kind upon indirect foreign ownership of such licenses. The Notice (at ¶ 68) proposed to eliminate the ECO test as part of the FCC's Section 310 analysis regarding indirect foreign ownership of

²⁶ The FCC sought comments on whether it should lift supplemental safeguards for foreign carriers whose settlement rate is at or below the low end of the benchmark range. Notice at ¶ 109. That proposal is unduly harsh. There is no reason to impose any dominant carrier safeguards, whether basic or supplemental, upon carriers whose settlement rate is within the FCC's proposed benchmark range, even if that rate is not at the bottom of the range.

Title III licenses in excess of 25%. However, the FCC states that it "retain[s] the authority to deny an application based on a finding that a grant would not serve the public interest or to condition the license to address specific concerns." Id. The FCC stated that it would accord a "strong presumption" to approving more than 25% indirect ownership, and the presumption normally could be rebutted only by producing "compelling evidence" that such an ownership interest posed a "very high risk" to competition. Id. at ¶¶ 10, 74-75. Nevertheless, the FCC stated that it would be prepared to deny or condition its approval based on "national security, law enforcement, foreign policy, or trade concerns brought to our attention by the Executive Branch." Id. at ¶ 74. The FCC asked parties to comment on whether it should take into account whether a WTO member country has fulfilled its WTO commitment in reviewing a Section 310 application filed by an entity from that country. Id. at ¶ 75.

DT strongly objects to the FCC's proposed approach for regulating indirect foreign ownership under Section 310. For the same reasons that the FCC's proposed "public interest" test for Section 214 applications is contrary to the GATS framework, the FCC's proposed "public interest" test for approving more than 25% indirect ownership of Title III licenses violates the GATS principles governing Market Access, MFN and Domestic Regulation.²⁷ Further, the FCC's proposal is an undeniable violation of the National Treatment principle to the extent that U.S.-owned entities will be able to obtain an indirect ownership interest in Title III licenses on more favorable terms than foreign carriers. As

²⁷ See pages 7-13 supra. Further, DT would reiterate that the GATS principles plainly prevent the United States Government not only from denying indirect foreign ownership in excess of 25% in Title III licensees, but from imposing conditions upon such approval that it does not impose upon U.S.-owned licensees. Such conditions are contrary to the Market Access, MFN and National Treatment principles under the GATS framework.

shown above, the FCC may not take foreign market power or the effectiveness of foreign regulations into account in determining whether or under what conditions to permit foreign carriers to enter the U.S. market.²⁸ DT urges the FCC to follow through on its WTO commitments by adopting an unqualified open entry policy for indirect foreign ownership of Title III licenses.²⁹

V. THE FCC SHOULD ADOPT TRANSPARENT AND NONDISCRIMINATORY STREAMLINED PROCESSING FOR U.S. AND FOREIGN-OWNED CARRIERS

The Notice (at ¶ 134) proposed to accord streamlined processing to Section 214 applications for international resale authority submitted by foreign-affiliated carriers. The FCC proposes to extend streamlined processing to facilities-based applications by such carriers so long as the applicant either (i) certifies that it will comply with the proposed basic and supplemental safeguards; or (ii) certifies that it will comply with the proposed basic safeguards and shows "clearly and convincingly" that the foreign country is a WTO member country who has "eliminated legal barriers to international facilities-based entry and licensed multiple additional facilities-based carriers to compete with the incumbent carriers." Id. at ¶ 136.³⁰

²⁸ See page 9 supra.

²⁹ For similar reasons, DT objects to the FCC's proposed policy for granting cable landing licenses to foreign carriers. The United States Government does not have the discretion to deny or condition a cable landing license based upon Executive Branch preferences or "compelling public interest reason[s]." Notice at ¶ 62. Any such action would violate the GATS principles involving Market Access, MFN, National Treatment and Domestic Regulation.

³⁰ The FCC does not propose to permit foreign-affiliated carriers to demonstrate that they do not have foreign market power and, therefore, they should not be subject to either basic or supplemental safeguards.

Initially, DT requests that the FCC clarify that it will not delay the processing of any Section 214 applications submitted by foreign carriers or their affiliates for trade or other political reasons at the request of other U.S. Government bodies or at the FCC's own initiative. As noted above, the FCC in the past has withheld prompt processing of the Section 214 applications filed by certain foreign-affiliated U.S. carriers under instructions from USTR and other U.S. Government agencies.³¹ Such conduct is illegal under the GATS principles regarding MFN and National Treatment, as well as the requirement in Section 3 of GATS Article VI that the FCC act upon the Section 214 applications filed by foreign carriers or their affiliates within a "reasonable period of time."

Further, the FCC's proposed streamlined processing standards openly discriminate between U.S.-owned and foreign-affiliated carriers in violation of the National Treatment principle. While the WTO Basic Telecom Agreement does not prevent the FCC from according different processing to resale and facilities-based Section 214 applications, the National Treatment principle does require the FCC to apply those standards even-handedly to both U.S.-owned and foreign-owned carriers. Further, the FCC must issue decisions on the applications filed by foreign-owned U.S. carriers as quickly as it issues decisions on the applications filed by U.S.-owned carriers, and in any event "within a reasonable time" under GATS Article VI. The National Treatment principle in GATS Article XVII emphasizes that discriminatory treatment between U.S.-owned and foreign-affiliated carriers will not be tolerated when the effect is to skew competitive conditions in favor of U.S.-owned carriers. According faster processing to the Section 214 applications of

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See pages 16-17 & n. 14 supra.

U.S.-owned carriers is an obvious competitive advantage for U.S. carriers in violation of the National Treatment obligation in GATS Article XVII.

In addition, the FCC's proposed standards would discriminate among foreign carriers in violation of the MFN principle.³² In particular, foreign carriers who are willing to certify that they will comply with the proposed supplemental safeguards will receive immediate streamlined processing, while foreign carriers who seek to demonstrate that supplemental safeguards do not apply will encounter delays before it is determined whether they are entitled to streamlined processing. As DT has shown elsewhere in these comments,³³ the WTO Basic Telecom Agreement prohibits the FCC from taking into account factors such as the effectiveness of a WTO member country's regulatory regime in deciding whether and on what terms to permit foreign carriers to enter the U.S. international telecommunications market. Therefore, DT recommends that the FCC adopt a streamlined processing regime that applies without discrimination between U.S.-owned and foreign-affiliated carriers.

³² Further, to the extent that delaying the processing of a Section 214 application is the functional equivalent of denying entry into the U.S. market for a period of time, the FCC's proposed standards for processing Section 214 applications violate the Market Access commitment of the United States.

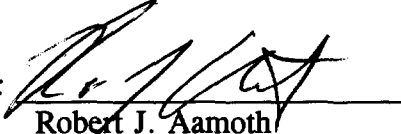
³³ See pages 19-20 supra.

Conclusion

For the foregoing reasons, DT submits that the FCC should adopt or modify its proposed WTO implementation rules as specified herein.

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CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that I have served a copy of the foregoing "Comments of Deutsche Telekom AG and Deutsche Telekom, Inc." on this 9th day of July, 1997, upon the following parties by hand:

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